In The

Supreme Court of the United States

October Term, 1975

No. 75-660

L. JOHN JACOBI and ROBERT GAMBERA, individually, on behalf of the members of the AMERICAN ASSOCIATION OF SECURITIES REPRESENTATIVES, and on behalf of all other securities representatives similarly situated,

Petitioners,

vs.

BACHE & CO., INC., WALSTON & CO., INC.; THOMSON & McKINNON AUCHINCLOSS, INC. (formerly THOMSON & McKINNON, INC.); HORNBLOWER-WEEKS, HEMPHILL, NOYES; LOEB, RHOADES & COMPANY; TUCKER, ANTHONY & R. L. DAY; HARRIS, UPHAM & CO., INC.; DOMINICK INT'L. CORP.; HALLE & STIEGLITZ, INC.; GOODBODY & CO., INC.; BEAR, STEARNS & CO.; LEHMAN BROS.; KIDDER PEABODY & CO., INC.; R.W. PRESSPRICK & CO., INC.; DEAN WITTER & CO., INC.; W.E. HUTTON; REYNOLDS & CO.; PAINE, WEBBER, JACKSON & CURTIS; SCHEINMAN, HOCKSTIN & TROTTA, INC.; PRESSMAN FROLICH & FROST, INC.; NEWBURGER, LOEB & CO.; RAUSHER, PIERCE SECURITIES CORP.; OPPENHEIMER & CO.; STEINER ROUSE & CO., INC.; L. F. ROTHSCHILD & CO.; SPENCER TRASK & CO.; SMITH BARNEY & CO., INC.; and THE NEW YORK STOCK EXCHANGE, INC.,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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Respondents, in their Brief in Opposition, do not deny that the NYSE Rule prohibiting payment of commissions based on the service charge would be a *per se* violation of the antitrust laws if adopted in a non-regulated industry. Rather, they rely on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), as supporting the contention that *per se* rules of antitrust liability do not apply to the securities industry even in those instances where there is no basis for antitrust immunity. As we have pointed out in our Petition, the reference to the "aegis of the rule of reason" in *Silver* was in the context of a discussion of those considerations which would lead to a finding of antitrust *immunity*, and simply have no application once the court has concluded, as the Court of Appeals did in the instant case, that there is no basis for conferring antitrust immunity.

Perhaps the best answer to respondent's argument, however, lies in this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973). There the question before this Court was whether a Rule of the New York Stock Exchange which required Registered Representatives to submit disputes with their employers to arbitration preempted a law of the State of California which provided that agreements to arbitrate such disputes did not preclude private suits in the courts. This Court held that the requirement that such disputes be submitted to arbitration was not necessary for "investor protection" and, therefore, did not preempt state law. Of particular significance to the instant case is the fact that the particular Rule involved in *Ware* was Subsection (b) of Rule 347 of the New York Stock Exchange Rules and Regulations, while the dispute in the instant case arises from the NYSE's failure to amend Subsection (a) of the very same Rule 347 to authorize

payment of commissions based on the service charge.* Rule 347 deals generally with the relationship between member firms and their Registered Representatives, and this Court's approach to Rule 347, as demonstrated in the *Ware* opinion, totally refutes the respondents' contention that the rule prohibiting the payment of commissions based on the service charge was a "reasonable" means of serving the purposes of the securities laws. This Court stated, in *Ware*, 414 U.S. at 135:

> "To begin with the obvious, there is nothing in the Act and there is no Commission rule or regulation that specified arbitration as the favored means of resolving employer-employee disputes. It is also clear that Rule 347(b) would not be subject to the Commission's modification or review under §19(b). The United States, as amicus, concedes as much, and we conclude, as the Government suggests, that *the relationship between compulsory employer-employee arbitration and fair dealing and investor protection is 'extremely attenuated and peripheral, if it exists at all.'*" (Emphasis supplied.)

However, "attenuated and peripheral" may have been the relationship between compulsory arbitration and investor protection in the *Ware* case, there is absolutely no relationship between the rule prohibiting payment of commissions based on

* A proposed amendment to Rule 347(a), which would have permitted the payment of commission based on the service charge, actually was drafted by a staff employee of the NYSE but was not submitted to the NYSE Board of Governors (28a).

the service charge and investor protection in the instant case. In fact, the Court of Appeals below recognized the non-existence of this relationship when it stated:

> "It is rather strong medicine to seek to spell out SEC sanction of the enforced omission of the service charge as a basis on which the compensation of registered representatives could be computed under employment agreements when the SEC consistently attempted to stay out of the controversy. More importantly, whereas §19(b) includes 'the fixing of reasonable rates of commission, interest, listing, and other charges' among the illustrations of the sort of matters on which the SEC can request changes in the rules and practices of exchanges, salary arrangements are not specifically included. *It would hardly be suggested that if NYSE prescribed a uniform method by which all member firms must compensate registered representatives, or even if it were only to set maximum compensation provisions, and filed rules embodying this with the SEC, that body could grant complete antitrust immunity. Immunizing such an agreement from the antitrust laws would not be 'necessary to make the Securities Exchange Act work.' Silver, supra, at 357; to the contrary, it 'would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act.' id. at 360. Even regulatory agencies with express power to grant*

> *antitrust immunity have not been authorized to do this in respect of agreements with employees.*" (Emphasis supplied) (13a).

The holding of the court below that there was no antitrust immunity necessarily carried with it the conclusion that there was no basis under the securities laws for finding that the regulation was a reasonable means of implementing the policies of the securities laws. There is no rational way that a New York Stock Exchange regulation can be found to be a reasonable means of implementing the purposes of the securities laws without also finding that it falls within the scope of the Exchange's antitrust immunity. Conversely, there is no rational basis on which one could conclude that the securities laws require the abandonment of traditional *per se* concepts of antitrust liability in a case where it already has been determined that the policies of the securities laws do not require the conferring of antitrust immunity. The holding below that *per se* rules of antitrust liability are generally displaced in the securities industry, even in those areas where there is no antitrust immunity, finds no support in logic, in policy, or in this Court's prior decisions.

Respectfully submitted,

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